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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 698

SEYMOUR SALB,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF BY PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Salb's petition for certiorari raised the single important question: "Whether it is permissible for a federal judge to impose a more severe sentence upon a criminal defendant because the defendant has exercised his Constitutional right to plead not guilty and stand trial" (p. 2). The Government's brief in opposition purports to respond to a very different question: Whether this Court should engage in a "review of the trial court's *exercise of discretion* with respect to the sentence imposed" (brief in opposition at p. 12, emphasis added).[1] Salb took great pains, in his petition, to point out that he is not asking this Court to review the trial court's *exercise of sentencing discretion* (petition

[1] In its statement of the questions presented, the Government puts the issue in yet another, and equally misleading, way: "Whether the trial court sentenced petitioners properly" (brief in opposition at p. 2).

at pp. 6-7); he is asking this Court to decide whether the challenged criterion—the defendant's assertion of his Constitutional right to plead not guilty and stand trial—may properly be considered by a trial judge in the exercise of his sentencing discretion.[2]

Because of its mischaracterization of the question raised by Salb's petition, the Government has not addressed itself to the propriety of the challenged practice.[3] Nor has it responded to Salb's carefully documented demonstration that the harsher sentence imposed on him than on the "chief culprits" cannot possibly be explained on the basis of differences in remorse, culpability, or the need for deterrence (see Salbo's petition at pp. 3-5, 20-23). It has contented itself with resorting to the same gross response to which many courts have resorted whenever a challenge to this practice is mounted: that the "record does not support the contention . . . ." But the Government does not suggest a single explanation for the 400 per cent harsher sentence imposed on Salb than on the "chief culprits."[4]

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[2] Indeed, Salb specifically stated in his petition that he was *not* asking this Court "to impose a new sentence." He asked that the case be "remanded to the District Court with instructions to resentence petitioner giving no weight to the fact that he asserted his Constitutional rights" (petition at p. 7).

[3] This is particularly surprising in light of the Supreme Court's obvious interest in this issue as reflected by its unusual action in *Johnson* v. *United States*, 382 U.S. 923 (1965) (Salb's petition at p. 10), and also in light of the Solicitor General's apparent condemnation of the challenged practice in his response in that case. (*Ibid.*)

[4] It does say, rather lamely, that the chief culprits' "lawyers argued that they should not be imprisoned because they had already been punished sufficiently." But that plea is made by all defense lawyers and does not explain the difference in sentences. The Government does attempt to explain why defendant Gerace received a lesser sentence than Salb. But Gerace's sentence is entirely irrelevant to Salb's claim. Salb has taken the position that the difference in sentences between him and Gerace may well be based on permissible grounds;

Instead, in attempting to deny that Salbo's sentence was affected by his insistence on pleading not guilty and standing trial, it is forced into the uncomfortable position of arguing with the findings of the Court of Appeals. The Court of Appeals explicitly found that the defendants who pleaded guilty were "the chief culprits," and that their "light sentence" constituted "a reward" (Appendix A, Salbo's petition at p. A-3). In attempting to explain away this finding, the Government makes the wholly unfounded assertion that the Court of Appeals' characterization of the defendants who pleaded guilty as the chief culprits "was a reference to their role as the principal actors in the *actual thefts* from Lederle rather than a suggestion that they were the kingpins in the conspiracy" (opposition brief at p. 12 n. 6, emphasis added). This is simply wrong. The context of the statement—a general discussion of the "enterprise that was the subject of this indictment"—makes it clear beyond dispute that Judge Friendly was characterizing the defendants who pleaded guilty as the chief culprits of the *entire enterprise* and not just of the "actual thefts." We reproduce the relevant sentences in a note in complete confidence that a fair reading will leave no doubt that the Government's interpretation is entirely without merit.[5]

Gerace was a minor participant (see Salb's petition at p. 3) whose unsolicited disclosures broke the case. But the fact that the difference in Salb's and Gerace's sentences may be justified is entirely irrelevant to the argument that the difference in Salb's and the chief culprits' sentences can only be explained as an impermissible "penalty imposed by courts for exercising a constitutional privilege." *Griffin v. California*, 380 U.S. 609 (1965).

[6] "The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the

In attempting to convert Salb into a "ringleader" and the "chief culprits" into innocent followers, the Government not only contradicts the Court of Appeals; it contradicts the record as well. In its "statement,"[5] the Government says that "each of the petitioners" was convicted on "count 9." But as Salb pointed out in his petition (at p. 27) *he was acquitted* on count 9 (R. 2565) and consequently was found guilty on fewer counts than any of the other five relevant defendants. Moreover, the Government's allegation that the trial court regarded Salb as a "tempter" of the actual thieves flies in the face of the record. The trial judge explicitly found that Fox, Fine, and Cancelarich stole the processes "on their own, wilfully and knowingly" (R. 2873). "Nobody told you to do this. You did this on your own. You weren't goosed, as the saying goes, by either Salb, or Sharff, or Bottone" (R. 2897).[6]

The Government's assertion that "This case is not like *United States* v. *Wiley* . . . (brief for the United States in opposition, p. 12), is based on a misstatement of the facts in *Wiley* which allegedly distinguish it from this case. The Government describes Wiley as "a minor defendant with-

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Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment. The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end." *United States* v. *Bottone, Salb and Sharff,* F.2d (1966) (Appendix A, Salb's petition).

[6] The Government's carelessness with the facts is also reflected by its assertion on page 13 that "The contention that petitioners were denied a fair trial because imposition of the sentences of [sic] petitioners' codefendants was delayed until the conclusion of petitioners' trial was not raised in the Court of Appeals." This also is untrue. That contention was explicitly raised in the reply brief to the Court of Appeals, filed on June 27, 1966, at p. 3.

out a criminal record" (*Id.* at 12-13). The sentencing judge in *Wiley* said, however, that Wiley "actually induced the commission of crimes such as these" (184 F. Supp. 679, 687), and that he *did* have a criminal record which included "a charge of receiving stolen property [for which he was] placed on probation for a period of six months" as well as "several" gambling arrests (Id. at 686). Salb, on the other hand, was entirely without a criminal record and was, in fact, a lesser defendant. The cases do present an important conflict which should be resolved by this Court.

Respectfully submitted,

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